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QUESTIONS AND ANSWERS

ON

AFFIRMATIVE ACTION

1977

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Questions and Answers on Affirmative Action

- Spells out the difference between nondiscrimination and affirmative action
- Explains the advantages of initiating an Affirmative Action Program before you are ordered to do so by a federal agency
- Shows how you can avoid an on-site review of your employment practices and policies
- Discusses the three major compliance agencies -- and how each can hurt you if you procrastinate on your Affirmative Action Program

☐ SECTION I: 60 QUESTIONS AND ANSWERS ON AFFIRMATIVE ACTION

- Q. What are the major federal laws and executive orders on equal employment opportunity?
- A. . Title VII of the Civil Rights Act of 1964
. Executive Order 11246
. Equal Pay Act of 1963
. The Age Discrimination in Employment Act
- Q. Briefly, what employers are covered by Title VII?
- A. With some very limited exceptions, Title VII applies to all employers with 15 or more employees, including state and local government agencies. It also covers labor unions with at least 15 members, joint apprenticeship committees, and employment agencies.
- Q. What does Title VII do?
- A. Title VII bans all discrimination in employment because of race, color, religion, sex, or national origin. It also forbids discrimination in union membership, hiring hall referral, apprenticeship programs, and referrals by employment agencies. It covers all terms and conditions of employment, and holds the employer responsible for any discrimination that goes on within the employer's organization.
- Q. What agency enforces Title VII?
- A. Title VII is administered and enforced by the Equal Employment Opportunity Commission.
- Q. What employers are covered by Executive Order 11246?
- A. Executive Order 11246 covers all employers with government contracts or subcontracts of over \$10,000, with some rare exemptions. It also applies to contractors and subcontractors on construction projects financed in whole or in part by federal funds.
- Q. What does E.O. 11246 do?
- A. The order requires that every contract contain a 7-point clause (see page 46 for the text) against discrimination because of race, color, religion, sex, or national origin.

In addition, regulations based on E.O. 11246 require all contractors and subcontractors with 50 or more employees and a contract of \$50,000 or more to develop and carry out a written Affirmative Action Program. These regulations are contained in Revised Order No. 4 (see page 181 of the Reference Guide for the full text). Revised Order No. 4 is must reading for anyone involved in developing and implementing an Affirmative Action Program, regardless of whether the organization has federal contracts.

●Q. Who enforces E.O. 11246?

A. E.O. 11246 is enforced by the federal contracting agencies that have been designated as compliance agencies by the Office of Federal Contract Compliance (OFCC) in the Labor Department.

●Q. What employers are covered by the Equal Pay Act?

A. The Equal Pay Act covers all employers who are covered by the Fair Labor Standards Act, of which it is a part. It applies to all employees to which the Fair Labor Standards Act applies -- plus executive administrative, and professional employees (including academic administrative personnel and teachers in elementary and secondary schools), and outside salespeople.

●Q. What does the Equal Pay Act do?

A. The Equal Pay Act forbids pay differentials on the basis of sex. (See page 381 of the Reference Guide for the full text.)

●Q. Who enforces the Equal Pay Act?

A. The Equal Pay Act is enforced by the Wage and Hour Division of the Department of Labor.

●Q. What employers are covered by the Age Discrimination in Employment Act?

A. This act covers the same employers as Title VII.

●Q. What does it do?

A. It bans discrimination because of age against anyone at least 40 years old but less than 65. (See page 421 of the Reference Guide for text.)

●Q. Who enforces the Age Act?

A. The act is enforced by the Wage and Hour Division of the Department of Labor.

•Q. How does the EEOC operate in administering Title VII?

A. Basically, the EEOC is an investigative commission. Any action on its part must begin with the filing of a charge of unlawful employment practices placed with the Commission. Although such a charge is usually filed by the person claiming discrimination -- or someone representing that person -- Title VII allows an EEOC Commissioner to file a charge directly at the federal level. A Commissioner charge can be filed when the person claiming discrimination has reason to fear reprisal for filing a charge or if there appears to be a pattern of discrimination against a class protected by Title VII.

•Q. What happens if the EEOC finds discrimination?

A. If the EEOC determines upon investigation that there is reasonable cause for the complaint, its first step is to resolve the issue through conciliation. EEOC conciliation attempts have four basic objectives:

1. Relief for the complaining person.
2. Relief for other employees in the organization who are similarly situated in terms of race, religion, sex, socioeconomic level, and comparable work and skills.
3. Correction of the practices that led to the complaint.
4. Affirmative action to enable the organization to qualify as an equal employment opportunity employer.

•Q. What happens if the EEOC's conciliation efforts fail to resolve the problem satisfactorily?

A. Sometimes plenty can happen. In 1972, amendments to Title VII (see Reference Guide, starting on page 15, line 26) empowered the EEOC to file suit in federal court against an employer when no conciliation agreement can be reached that is acceptable to the Commission. And this includes class-action suits

•Q. What's a class-action suit?

A. A class-action suit (or it's sometimes called a pattern-and-practice suit) ~~includes not discrimination against just one employee but against a whole "affected class" of employees.~~ The EEOC files such

a suit when it concludes that individual complaints are not isolated cases but represent a widespread pattern of discrimination against a whole group of employees protected by Title VII, such as blacks or women.

●Q. Is the EEOC's enforcement power important to employers?

A. It most certainly is. Before this change, an employer could afford to give low priority to complaints of discrimination from individual employees. The reason: While a complaint might result in the reinstatement of one employee with some back pay, the cost was unlikely to be more than that. Now, however, an employer can no longer feel complacent when an individual employee complains to the EEOC.

●Q. Why is that?

A. Because now the EEOC can expand any individual complaint into a broad indictment of discrimination against entire groups of employees -- and then seek financial damages for each affected employee.

●Q. What happens when an employer loses a class-action suit in the courts?

A. The court usually orders the employer to do three things:

Pay dollar damages to the entire "affected class" of employees as compensation for denied wages, opportunities, and benefits.

Stop engaging in the discriminatory practices.

Make specific changes in its personnel procedures

and increase its hiring, promotion, and transfer of the "affected class" to eradicate the present effects of past unlawful practices.

●Q. What are some of the charges on which the EEOC has been taking employers to court?

- A.
- Failing to recruit women and minorities for traditionally male and/or high-paying jobs;
 - Using discriminatory tests for hiring and promotion;
 - Using unlawful hiring criteria adversely affecting women and minorities -- such as arrest records, height, weight, family status;
 - Not allowing female employees to work after the third month of pregnancy;
 - Imposing a high-school diploma requirement without showing job-relatedness;
 - Discriminating against women with respect to job assignments, pay, and hours;
 - Discriminating against women, blacks, and Spanish-surnamed Americans in recruiting, testing, hiring, training, job assignment, transfer and promotion;
 - Discriminating against women by treating pregnancy differently from other nonoccupational disabilities;
 - Relegating women and minorities to low-paid, undesirable jobs;
 - Excluding blacks from supervisory, clerical, sales, skilled, and technical jobs;
 - Laying off female employees while retaining male employees with less seniority;
 - Excluding female employees from supervisory positions;
 - Limiting overtime work for female employees;
 - Using stiffer promotion criteria for women than for men;
 - Firing a female employee after she filed sex discrimination charges against her employer;
 - Using sex-segregated help-wanted ads;
 - Requiring job applicants to weigh 130 pounds;
 - Enforcing male and female job classifications;

- Limiting women to low-paying clerical jobs;
 - Using hiring criteria that exclude female applicants.
- Q. Has the EEOC issued any regulations or guidelines and regulations (page numbers tell you where to find each text in your Reference Guide):
- EEOC Procedural Regulations (Page 31-60)
 - EEOC Requirements on Records and Reports (Page 61-76d)
 - EEOC Guidelines on Discrimination Because of Sex (Page 77-86)
 - EEOC Guidelines on Discrimination Because of Religion (Page 87-88)
 - EEOC Guidelines on Discrimination Because of National Origin (Page 89-92)
 - EEOC Guidelines on Employee Selection Procedures (Page 93-106)
 - Availability of EEOC Records (Page 107-119)
 - Pre-Employment Inquiries (Page 121-123)
- Q. Do EEOC guidelines have the force of law?
- A. No, but in general the courts support the EEOC positions stated in these guidelines.
- Q. How do the OFCC and its designated compliance agencies enforce Executive Order 11246?
- A. The OFCC generally oversees the administration of E.O. 11246, but it delegates actual enforcement activities to government contracting agencies which it has designated as OFCC compliance agencies.
- Q. Do these compliance agencies investigate discrimination complaints in the same way that the EEO does?
- A. No. Although an individual employee can bring a discrimination complaint to the OFCC, OFCC compliance agencies have a basically different role than the EEOC. Their function is primarily to review and determine how well federal contractors and subcontractors are complying with the requirements of E.O. 11246 and OFCC regulations based on E.O. 11246.
- Q. What factors is compliance based upon?
- A. First, all employers with contracts or subcontracts

of over \$10,000 (with some rare exceptions) are required to include in their contracts a 7-point clause. The full text of the clause is on Page 126-8 of your Reference Guide, but here is a brief summary of provisions:

- . The contractor will not discriminate in hiring, work assignments, promotions, layoffs or recruiting on the basis of race, color, religion, sex, or national origin.
- . The contractor will state in all advertisements for employment that discrimination will not be practiced.
- . The contractor will notify all labor unions with which he has a contract, agreement, or understanding that he must and will comply with the anti-discrimination provisions of the government contract.
- . The contractor will agree to comply with all orders, rules and regulations.
- . The contractor will furnish necessary compliance reports and permit access to his records by the government.
- . The contractor agrees that the contract may be cancelled and he may be "blacklisted" after a hearing if he does not comply.

●Q. What else is compliance based on?

- A. On a review of the Affirmative Action Program that is required -- by Revised Order No. 4 -- of all contractors and subcontractors with 50 or more employees and a contract of \$50,000 or more.

●Q. Briefly, what's involved in an Affirmative Action Program as required by Revised Order No. 4?

- A. A contractor must analyze all major job groups in its organization to determine if women or minorities are being underutilized. ("Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability in the labor area.) If the analysis reveals any underutilization, the contractor must make an in-depth analysis of its personnel practices to pinpoint the reasons. Then the contractor must decide on specific goals and timetables for correcting any underutilization. Finally, the employee must make every good faith effort to implement the Affirmative Action Program and achieve the goals and timetables.

●Q. How does an OFCC compliance agency evaluate an Affirmative Action Program?

- A. Until recently, a contractor's Affirmative Action Program could not be accepted without an on-site review by whatever OFCC compliance agency had jurisdiction. However, the OFCC has recently revised these procedures in Revised Order No. 14 (not to be confused with Revised Order No. 4). You will find the text of Revised Order No. 14 starting on Page 205 of your Reference Guide, and it makes extremely worthwhile reading.

●Q. How does Revised Order No. 14 change the procedures for reviewing an organization's Affirmative Action Program?

- A. Under the new procedure, a contractor's Affirmative Action Program can be accepted without any on-site review. Here's how: Upon request the contractor sends his written Affirmative Action Program to the compliance agency. The compliance agency gives it a "desk audit", using a Standard Compliance Review Report.

Only if the Affirmative Action Program is judged inadequate on the basis of the desk audit will an on-site review be necessary. Thus if you are a federal contractor or subcontractor required to develop an Affirmative Action Program, you can avoid an on-site review by sending in a comprehensive, thoroughly developed and documented program meeting the regulations in Revised Order No. 4. One of the purposes of this EEO Compliance Kit is to help you send in such a program.

●Q. Can a contractor stop worrying about compliance once its Affirmative Action Program is accepted?

- A. Absolutely not. Compliance is based on more than what a contractor says it is going to do in its Affirmative Action Program. Compliance is also based on the contractor's adherence to the program and its good faith efforts to achieve the goals and timetables specified in the program. OFCC compliance agencies regularly review federal contractors and subcontractors. Once an Affirmative Action Program is accepted, a contractor will be regularly reviewed by an OFCC compliance agency to make sure it is actually implementing the program.

Moreover, in response to the new militancy of the EEOC, the OFCC is demanding that federal contractors move more quickly to eradicate the effects of past discrimination. That means the OFCC will no longer be as patient as it has been in the past -- it wants to see employers take immediate, effective action to grant relief to any

"affected class" of employees who have been held back by prior or present discrimination.

●Q. How does the OFCC enforce compliance with E.O. 11246 and related regulations?

- A. You must develop and keep on file a written Affirmative Action Program with 120 days from the commencement of a contract. If, upon review, an OFCC compliance agency decides you are not in compliance, it will issue a notice giving you 30 days to show cause why enforcement proceedings should not be started. During this period, the compliance agency will try to obtain compliance informally through conciliation. Should that fail, the agency will take steps leading to the cancellation of your contract and debarment from future contracts.

●Q. What regulations and guidelines has the OFCC issued that will help a contractor comply with E.O. 11246?

- A. The OFCC has issued the following guidelines and regulations (page numbers tell you where to find each text in your Reference Guide).
- OFCC Rules and Regulations on the Obligations of Government Contractors and Subcontractors (Page 141).
 - OFCC Affirmative Action Guidelines -- Revised Order No. 4 (Page 181).
 - Revised Order No. 14 (Page 205).
 - Technical Guidance Memo No. 1 on Revised Order No. 4 (Page 234).
 - OFCC Order on Employee Testing and Other Selection Procedures (Page 247).
 - OFCC Sex Discrimination Guidelines (Page 263).
 - Rules on Examination and Copying of OFCC Documents (Page 271).
 - OFCC Guidelines on Discrimination because of Religion or National Origin (Page 271).

●Q. What's the relationship between Title VII and Executive Order 11246?

- A. They are not mutually exclusive. An employer can be covered by either or both and can be subject to en-

forcement procedures under both. With few exceptions, the OFCC's interpretations of E.O. 11246 are pretty much the same as EEOC's interpretations of Title VII.

●Q. Do the OFCC and the EEOC have a basic report that must be filed by employers?

- A. Yes. It's called Standard Form 100 -- Employer Information Report EEO-1. (At the end of this section you will find a copy of this form.) Report EEO-1 is intended to show the representation of female and minority employees in an employer's total workforce. Employers may acquire the necessary information from either visual surveys of the workforce or postemployment records on the racial or ethnic identity of employees. (Obtaining such information from an employee by direct inquiry is not encouraged.)

●Q. Who must file the EEO-1 report?

- A. The EEOC requires any employer covered by Title VII who has 100 or more employees to file the EEO-1 report. In addition, some employers covered by Title VII who have fewer than 100 employees must file the report:

- If the organization is owned or affiliated with another organization; there is centralized ownership, control, and management; and the group constitutes a single enterprise that has at least 100 employees.

All federal contractors and subcontractors must file the report.

●Q. How often must the EEO-1 report be filed?

- A. Once a year.

●Q. How does the Labor Department's Wage and Hour Division enforce the Equal Pay Act of 1963?

- A. Vigorously. Basically, the Wage and Hour Division has two approaches to investigating an employer's compliance with the Equal Pay Act. Wage and Hour compliance officers -- there are almost 1,000 -- may simply walk into any organization covered by the Equal Pay Act and do a spot-check (they usually call for an appointment first, however). They did 74,000 such spot-checks during 1972. Or they may investigate an employer in response to a complaint by an employee -- who can remain anonymous if he or she chooses.

If an employer is violating the Equal Pay Act -- whether intentionally or not -- Wage and Hour investigation can really hurt, for a number of reasons.

- Even is just one employee in one facility of an organization files a complaint with Wage and Hour, the entire organization may be investigated.
- The Wage and Hour Division moves quickly -- it wraps up a case in less than three months.
- When the Wage and Hour Division takes an employer to court, it usually wins -- it has won almost all of the suits it has filed so far.
- Noncompliance with the Equal Pay Act can be costly. A number of organizations have had to shell out between \$500,000 and \$1,000,000 in back pay, while in the unprecedented AT&T agreement, about \$7 million of the total \$15 million in back pay involved settlements under the Equal Pay Act.

•Q. What is the Wage and Hour Division's enforcement procedure?

- A. If, after investigating an employer, the Wage and Hour compliance officer finds violation of the Equal Pay Act, the officer will inform the employer how much is owed in back pay. If the employer wants to contest the Wage and Hour Division's findings, the case is processed according to the enforcement procedures of the Fair Labor Standards Act, of which the Equal Pay Act is a part. (Under the Equal Pay Act, the Secretary of Labor is not required to attempt voluntary compliance through informal methods of conference, conciliation, and persuasion before resorting to the FLSA procedures.)

The FLSA provides for enforcement through suits by individual employees, collective action by employees, wage collection suits by the Secretary of Labor upon the request of an employee, and injunctive suits by the Secretary of Labor.

•Q. What is the Wage and Hour Division's role in enforcing the Age Discrimination in Employment Act?

- A. Basically the same as its role in enforcing the Equal Pay Act. The major difference is that the Age Act specifically requires the Secretary of Labor to attempt voluntary compliance through informal methods of conference, conciliation, and persuasion before resorting to the FLSA procedures. The Age Discrimination Law is being enforced more vigorously than it has been in the past. The Labor Department is applying the "pattern and practice" concept to age discrimination in the same way it is applied to race and sex discrimination.

-- and in June, 1974, this approach resulted in Standard Oil of California agreeing to pay \$2 million in back wages to 160 former employees who had been discharged.

- Q. Now that we've talked about the major federal EEO laws and the agencies that enforce them, let's go back to the affirmative action required by the OFCC through Revised Order No. 4. Is there a difference between affirmative action and nondiscrimination?

A. Yes, there is a major difference.

- Nondiscrimination requires the elimination of all existing discriminatory conditions, whether purposeful or inadvertent. An employer must carefully and systematically examine all of its employment policies to be sure that they do not operate to the detriment of any person on grounds of race, color, religion, sex, or national origin. The employer must also ensure that the practices of those responsible in matters of employment, including all supervisors, are nondiscriminatory.
- Affirmative action requires the employer to do more than ensure employment neutrality with regard to race, color, religion, sex and national origin. As the phrase implies, affirmative action requires the employer to make additional efforts to recruit, hire and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer. The premise of the affirmative action concept is that unless positive steps are undertaken to overcome the effects of unintentional discrimination, a benign neutrality in employment practices will tend to perpetuate the status quo indefinitely.

- Q. But, what is unintentional discrimination?

A. They are practices that on their face may seem to be nondiscriminatory -- and are not intended to be discriminatory -- but which have discriminatory effects.

- Q. Can you give an example?

A. Yes. An organization may be giving all job applicants equal consideration, regardless of race, color, religion, sex or national origin. That's nondiscrimination on its face. But, let's assume that the

organization gets all of its job applicants through word-of-mouth referral from its employees. And that almost all of its employees are white, and therefore almost all of the job applicants are white. Technically, the organization is practicing nondiscrimination. In actuality, it is discriminating against minorities.

- Q. Do you mean our organization could be charged with unlawful discrimination on this basis?
- A. Absolutely. Under Title VII, any employment practice, whether or not it is discriminatory on its face, is illegal if it has the effect of discriminating against anyone because of race, color, religion, sex, or national origin. This has been upheld by the courts. To put it another way, discriminatory intent is not the governing factor -- it's the result of the practice that determines whether it is discriminatory or not.
- Q. What would be another example of unintentional discrimination?
- A. Let us suppose that an organization applied the same standards to all candidates for promotion, regardless of race, color, religion, sex, or national origin. Nondiscriminatory on its face, yes. But let's look at the requirements for promotion to a specific job in the organization. To be promoted to this job, the candidate must have experience in a lower-level job that requires the lifting of equipment weighing over 50 pounds. Unless the organization can prove that this lower-level job teaches skills that are eventually used in the higher-level job, it may well be charged with unlawful discrimination. The reason: This requirement for promotion rules out the bulk of female candidates, and therefore discriminates on the basis of sex -- which is unlawful under Title VII.
- Q. Is there any way to legally justify a practice that has a discriminatory effect?
- A. To justify any practice which has "disparate effect" on groups protected by the law, an employer must demonstrate compelling "business necessity" and that no alternative nondiscriminatory practice can achieve the required purposes. Courts have interpreted "business necessity" very narrowly, requiring overriding evidence that a discriminatory practice is "essential" to safe and efficient operation of the business, and/or a showing of extreme adverse financial impact.
- Q. Does Title VII require affirmative action?
- A. Not in so many words. Title VII basically requires nondiscrimination in employment -- actual nondiscrimination.
- Q. Then why is it necessary for an organization without federal contracts or subcontracts to undertake affirmative action?

- A. Because the EEOC, which administers Title VII, judges discrimination by effect, not intent. If the EEOC investigates an organization and finds that minorities and/or women are substantially under-represented in certain job categories, it will consider that a prima facie case of discrimination -- whether or not the organization so intended it. To remedy this situation requires strong affirmative action, not mere nondiscrimination.
- Q. But if an organization no longer has any overtly discriminatory policies, why should it be charged with discrimination?
- A. Because the view of the EEOC is that an employer must be held accountable for the present effects of past discriminatory acts.
- Q. Can the EEOC actually enforce affirmative action from an organization?
- A. Yes, the EEOC, through court order, can require an organization to undertake an Affirmative Action Program similar to that required of federal contractors by Revised Order No. 4.
- Q. But why should an organization undertake affirmative action before it is required to by either Revised Order No. 4 or the EEOC through the courts?
- A. An Affirmative Action Program makes the same kind of good business sense that any preventive maintenance program does. Although it's no guarantee that you won't be charged with discrimination by an individual employee, a sound Affirmative Action Program reduces the likelihood of an individual charge being broadened into a potentially costly class action suit.
- Q. Why is that?
- A. Because the best defense any organization can have against a discrimination charge is to have an Affirmative Action Program that concentrates special efforts on the most prominent targets for "affected class" court actions. Of course, the efforts must be real -- not window dressing. And an employer must be able to show that it is making at least some progress in eliminating the effects of any past discrimination.
- Q. Why is so much data and recordkeeping required by federal agencies dealing with EEO?
- A. There is undoubtedly a heavy burden of data and record-

keeping associated with developing and implementing an Affirmative Action Program. However, there appears to be no way of avoiding it. Federal agencies claim that without the data and the records, they would be unable to determine if you are in compliance with EEO laws. And you would be unable to pinpoint your EEO problems. This is vitally important, because a top priority of your Affirmative Action Program must be to eliminate those EEO deficiencies that make you vulnerable to costly class-action suits. You can't know where those deficiencies are without the data. You need data to show the results of all of your personnel practices and to show the progress you are making toward your affirmative action goals. That's why much of your EEO Compliance Kit is devoted to giving you the instructions and the forms you need for compiling the necessary data and keeping the necessary records.

- Q. In developing an Affirmative Action Program, should priority be given to women or minorities?
 - A. That depends on where your most pressing underutilization problems lie. Many organizations have for some time made efforts to end underutilization of minorities but have not yet addressed themselves to underutilization problems involving women. This means that affirmative action for women may need some extra catch-up attention.
- Q. Are there differences between affirmative action for minorities and for women?
 - A. Definitely yes. For example, in most organizations there are not enough minority employees, so affirmative action for minorities must emphasize recruiting and hiring. But since an organization usually has a large number of female employees, the major problem here is to develop and upgrade them internally. Because of this and other differences in the EEO problems of minorities and women, it often makes sense to establish a separate Affirmative Action Program for women so that special emphasis can be put where it is needed. This will also help to convince your female employees -- and potential employees -- that you really mean business when you say you are working toward equal job rights for women in your organization.